



Our reference: CP16/01606

Mr Jonathan Todd
ATO General Counsel
Australian Taxation Office

Sent via email to: jonathan.todd@ato.gov.au

Dear Mr Todd

Freedom of information complaint – Notice of investigation results

I refer to Mr Ben Fairless's complaint about the Australian Taxation Office (the ATO) made under section 70 of the *Freedom of Information Act 1982* (Cth) (the FOI Act).

I am writing in accordance with s 86(1) of the FOI Act to inform you that I have completed my investigation into this complaint and to advise you of the outcome.

Background

On 22 July 2016, you wrote to my office stating that the ATO intended to refuse to process FOI requests made through the 'Right to Know' website (RTK website) to address work health and safety (WHS) risks to ATO officers handling these requests.

On 19 August 2016, the ATO notified the RTK website administrators of its decision not to respond to requests made through the RTK website.

On the same date, Mr Fairless requested, through the RTK website, access to documents relating to the ATO's decision not to respond to requests made through the RTK website.

On 24 August 2016, the ATO responded to Mr Fairless's request as follows:

The ATO does not process FOI requests received via righttoknow.org.au. Please send your FOI request direct to foi@ato.gov.au, or lodge via paper form available at <https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/n2877-09-2014.pdf>. Alternatively, you can contact the ATO on 13 28 69 and ask for Freedom of Information.

On 27 August 2016, Mr Fairless lodged an application for IC review with the OAIC. Mr Fairless sought to have the ATO process his request dated 19 August 2016, in accordance with the FOI Act and the FOI Guidelines. On 22 September 2016, the OAIC advised Mr Fairless that the matter would be dealt with as an FOI complaint as there was no reviewable decision at the time the application for IC review was filed.

On 8 November 2016, the OAIC notified the parties of our decision to conduct an investigation into Mr Fairless's FOI complaint under s 69 of the FOI Act. We asked the ATO to provide submissions to support its decision not to process Mr Fairless's FOI request.

On 17 November 2016, the ATO submitted that it is concerned about the WHS risks for ATO officers managing FOI requests made through the RTK website, and the privacy of individuals whose personal information is published on the website. The ATO asked my office to assist with negotiating an agreement or protocol with the RTK website administrators to address its concerns.

On 21 November 2016, the OAIC requested information from the RTK website administrators under s 76(2) of the FOI Act, about the administration of the website and its takedown policy.

On 23 November 2016, the ATO acknowledged that Mr Fairless's FOI request made through the RTK website was valid for the purposes of the FOI Act, but refused to process any requests made through the RTK website in order to manage its WHS obligations.

On 4 December 2016, the RTK website administrators responded to the OAIC's request for information. The RTK website administrators submitted that:

All requests (to take down personal information) received via contact forms on our site are directed to a central email address (contact@righttoknow.org.au). We assess each request in line with the policies stated on our website and respond promptly.

The ATO has sent us 5 takedown requests. We give every request serious consideration and have responded to each within a day. We agreed with 4 requests and promptly acted on them to remove the material. One of the most recent requests did not meet our takedown policy so we have not taken it down.

We've previously been asked to redact the names of ATO staff due to a processing error made by the ATO which put their staff at risk. We responded within an hour and agreed to take down the material, giving the ATO time to supply correctly redacted documents a few days later.

In one case we were not asked to redact names. Instead we were asked to remove a request by a member of the public for an internal review into the decision about their FOI request. The ATO claimed that they found it abusive towards their staff members. The ATO's takedown request did not meet our takedown policy, so we left the request up on Right To Know.

On 19 January 2017, the OAIC provided its preliminary view to the ATO that it is not the role of the OAIC to arbitrate on what material should be removed from the RTK website or the policies adopted by the RTK website administrators, and disclosure of the names of officials performing their public duties is not usually regarded as an unreasonable disclosure of personal information. The OAIC then invited the ATO to provide further submissions about the issues raised in the preliminary view.

On 15 February 2017, the ATO made further submissions about the events that gave rise to its decision to refuse to process FOI requests made through the RTK website.

Investigation results

I have considered all of the material put forward by the ATO and the RTK website administrators.

Section 15 outlines the formal requirements for making a request for documents under the FOI Act. The relevant aspects of s 15 for this complaint are:

(2) The request must:

(a) be in writing; and

...

(c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).

(2A) The request must be sent to the agency or Minister. The request may be sent in any of the following ways:

...

(c) sending by electronic communication to an electronic address specified by the agency or Minister.

As well, Part 3.48 of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines), to which regard must be had in performing a function or exercising a power under the FOI Act, provide that a request can be posted on a public website and forwarded to a specified electronic address of the agency or the Minister. The FOI Guidelines reference the RTK website in the footnote, as an example of such a website.

I find that Mr Fairless's FOI request made through the RTK website satisfied the formal requirements in s 15 and is therefore a valid FOI request for the purposes of the FOI Act.

In the ATO's submissions, an incident that gave rise to the ATO's decision to refuse to process FOI requests made through the RTK website was referred to, where the RTK website administrators refused to take down material that the ATO considered to be abusive material directed towards its staff.

The RTK website administrators submitted that it refused to take down the specific material because it considered that the ATO's request did not meet its takedown policy. The ATO did not ask the RTK website administrators to remove the name of the affected ATO staff, instead, it asked the RTK website administrators to remove a request for internal review of the ATO's FOI decision.

The powers of the Information Commissioner do not extend to the administration of the RTK website.

Conclusions

I find that the ATO failed to process Mr Fairless's valid FOI request made through the RTK website.

Recommendations

Under s 88 of the FOI Act, I recommend that the ATO process valid FOI requests made through the RTK website.

I believe this recommendation is appropriate to complete this investigation.

Next Step

I seek your confirmation that the ATO will take adequate and appropriate action to implement my recommendation.

I am authorised under s 89 of the FOI Act to send an implementation notice if I am not satisfied that the ATO has taken action that is adequate and appropriate in the circumstances to implement my recommendation.

Further information about complaint investigations can be found in [Part 11](#) of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act.

A copy of this letter will be provided to Mr Fairless.

Please contact Brandon Chen on [REDACTED] or by email at [REDACTED] if you would like to discuss this matter. Please quote the reference number CP16/01606.

Yours sincerely



Timothy Pilgrim
Australian Information Commissioner

5 May 2017